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Proposed Special Litigation Counsel
for the Chapter 7 Trustee
KAVITA GUPTA

UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

In re GABRIEL TECHNOLOGIES CORP, *et al*, Debtors. E.I.N.s 22-3063052; 20-1711149	CASE NO. 13-30340 – DM (Case No. 13-30341) Chapter 7 (Jointly Administered) **APPLICATION OF KAVITA GUPTA, CHAPTER 7 TRUSTEE FOR THE JOINTLY ADMINISTERED BANKRUPTCY ESTATES OF GABRIEL TECHNOLOGIES CORPORATION AND TRACE TECHOLOGIES, LLC, FOR AN ORDER AUTHORIZING EMPLOYMENT OF BROWN RUDNICK LLP AS SPECIAL LITIGATION COUNSEL** **[NO HEARING REQUIRED PURSUANT TO LOCAL RULE 9014-1(b)(3)]**

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TO THE HONORABLE DENNIS MONTALI, UNITED STATES BANKRUPTCY COURT JUDGE, THE OFFICE OF THE UNITED STATES TRUSTEE, AND ALL PARTIES IN INTEREST:

Kavita Gupta, the Chapter 7 Trustee (the "Trustee") for the jointly administered bankruptcy estates of Gabriel Technologies Corporation and Trace Technologies, LLC (collectively, the "Debtors") submits this application (the "Application"), in the above-captioned jointly administered bankruptcy cases (the "Bankruptcy Cases"), for an order: (1) authorizing the Trustee to employ the law firm of Brown Rudnick LLP ("Special Counsel") as the Trustee's special litigation counsel pursuant to 11 U.S.C. § 328 of Title 11 of the United States Code (the "Bankruptcy Code"); (2) authorizing the Trustee to reimburse costs and expenses to Special Counsel upon application pursuant to Sections 327, 330(a)(1)(b), and 331 of the Bankruptcy Code; and (3) approving the contingency fee arrangement (described below). This Application is brought pursuant to the above-reference sections of the Bankruptcy Code, and Rules 2014 and 6003(a) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and is based on the statements contained herein, the supporting Declarations of Kavita Gupta (the "Gupta Decl.") and Cathrine M. Castaldi (the "Castaldi Decl."). In support of the Application, the Trustee respectfully represent as follows:

1. JURISDICTION

This Court has jurisdiction over this Application pursuant to 28 U.S.C. §§ 157 and 1334. Venue of these cases is proper pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicate for the relief sought herein is Sections 327 and 328 of the Bankruptcy Code.

2. FACTUAL BACKGROUND

A. Commencement of the Bankruptcy Cases

Gabriel Technologies Corporation commenced its bankruptcy case by filing its Chapter 11 Voluntary Petition on February 14, 2013. Trace Technologies LLC also commenced its bankruptcy case by filing its Chapter 11 Voluntary Petition on February 14, 2013. Motions for Joint Administration were filed in the Gabriel Bankruptcy Case and the Trace Bankruptcy Case on

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February 14, 2013 [Docket No. 4], and Orders Granting Joint Administration of the Gabriel Bankruptcy Case and the Trace Bankruptcy Case were entered on February 25, 2013 [Docket Nos. 19 and 20, respectively].

B. Conversion of Bankruptcy Cases to Chapter 7

On June 30, 2014, the Debtors filed a Status Conference Statement setting forth their willingness to have their cases converted to Chapter 7 [Docket 238]. Thereafter, on July 8, 2014, this Court issued its Order Granting Conversion of Case to Chapter 7 in the Gabriel Bankruptcy Case and Trace Bankruptcy Case [Docket Nos. 239 and 25, respectively].

C. Selection of Kavita Gupta as Chapter 7 Trustee

On August 19, 2014, Kavita Gupta was selected to serve as the Chapter 7 Trustee in the Bankruptcy Cases following an undisputed election held on August 12, 2014 [Docket 250]. The Chapter 7 Trustee filed the required bond on August 25, 2014 [Docket 254].

3. SCOPE OF SERVICES TO BE PROVIDED

The Trustee seeks to employ the Firm as special litigation counsel as of January 13, 2015. In the Bankruptcy Cases, the Firm will represent the Trustee in connection with (1) investigating, evaluating and negotiating or litigating claims held by the Bankruptcy Estates against Hughes Hubbard & Reed, LLP ("Hughes") and Wang, Hartmann Gibb & Caulley ("WHGC"); and (2) investigating, evaluating, negotiating and, upon mutual agreement, litigating claims the Bankruptcy Estates may have against the Debtors' directors and officers. If it becomes necessary for the Trustee to pursue claims against the Debtors' directors and officers, the Trustee will seek to employ the Firm on such terms and conditions as may be set forth in such separate application. The Firm is well qualified to serve as special litigation counsel to the Trustee.

As reflected in the Castaldi Declaration, the Firm is a highly regarded international law firm. The Firm's more than 200 lawyers provide assistance across key areas of the law, including corporate, capital markets, litigation, international arbitration, restructuring and bankruptcy, intellectual property, white collar defense and government investigations, securities, government contracts, law & strategies, energy and real estate.

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The Firm's Orange County office includes a core group of attorneys who concentrate their practice in insolvency, bankruptcy and litigation with a history of successfully trying difficult and complex cases. The Firm has significant litigation and bankruptcy experience, has represented numerous debtors, creditors and trustees in bankruptcy cases, has handled many adversary proceedings within various bankruptcy cases, and is well qualified to represent the Trustee in investigating and negotiating resolutions to potential claims held by the Trustee against Hughes and WHGC.

Attached as Exhibit "2" are the resumes of the attorneys at the Firm who will be primarily overseeing the services rendered to the Trustee in this case.

4. TERMS OF THE PROPOSED EMPLOYMENT

The salient terms of Special Counsel's employment are set forth in the Firm's proposed engagement agreement (the "Engagement Agreement") with the Trustee, which is attached as Exhibit "1" to the Castaldi Declaration.

A. Contingency Fee

The Firm proposes to render services to the Trustee on a contingency fee basis pursuant to Section 328(a) of the Bankruptcy Code. The Firm will be paid out of any recovery, settlement, arbitration award, verdict or any other legal vehicle ("Award") related to the scope of services at the rate of (1) 25% of the gross amount of any Award received before the Firm files any legal proceeding; (2) thirty percent (30%) of the gross amount of any Award after the Firm files any legal proceeding; or (3) 40% of the gross amount of any Award occurring from and after the date forty-five (45) days prior to the date set for trial. The Trustee believes that the compensation arrangement set forth in the Engagement Agreement is reasonable.

B. Reimbursement of Expenses

In addition to the contingency fee for services, the Trustee will pay and reimburse the Firm for its actual and necessary out of pocket costs and expenses, including experts, incurred in connection with the engagement, subject to approval of the Bankruptcy Court in the Bankruptcy Cases, which will be sought by periodic applications to the Court pursuant to Sections 330(a)(1)(b) and 331 of the Bankruptcy Code.

The Firm will seek approval of compensation for services and reimbursement of costs and expenses as may be allowed by this Court in accordance with applicable law, including Sections 328, 330 and 331 of the Bankruptcy Code, such sums to be based upon the contingency rate set forth above and the costs and expenses incurred. No compensation or reimbursement of expenses will be paid as final, except as approved by the Court, with compensation to be reviewed under the standard set forth in Section 328 of the Bankruptcy Code. The Trustee believes that employing the Firm on the terms and conditions of compensation set forth in the Engagement Agreement is in the best interest of the Debtors and their creditors. The Firm reserves the right to seek modification of the terms of employment upon application and Court approval for any such modification.

5. DISCLOSURES PURSUANT TO RULE 2014

A. The Firm Is A "Disinterested" Person

To the best of the Firm's knowledge, neither the Firm, nor any of the attorneys comprising or employed by the Firm, have any connection with the Debtors, creditors of the Debtors, or any other party in interest, their respective attorneys and accountants, the United States Trustee, or any person employed in the office of the United States Trustee, other than as set forth in the Castaldi Declaration.

B. Absence of Adverse Interests As To The Specified Services To Be Provided

To the best of the knowledge of the Firm, the Firm does not have any connection with the Debtors, its significant creditors or other significant parties in interest to the Debtors, or to a Judge of this Court, or the Office of the United States Trustee for Region 17 with respect to the matters on which the Firm is to be employed as Special Litigation Counsel. Upon discovery of any fact that may create an actual or potential conflict that bears upon the Firm's continued disinterestedness, the Firm will give notice to those parties that received the original notice to employ the Firm as Special Litigation Counsel and parties requesting special notice. The notice will outline the facts giving rise to the Firm's potential conflict of interest. At such time, the parties in interest will be given fourteen (14) days to object to the Firm's continued representation of the Trustee.

C. No Sharing Of Compensation

In accordance with Section 504 of the Bankruptcy Code, no understanding exists for the sharing of compensation received or to be received by the Firm for services rendered in the Bankruptcy Cases, except that the compensation received will be shared among the partners and associates of the Firm.

D. Firm's Awareness Of And Compliance With Applicable Law

As reflected in the attached Castaldi Declaration, the Firm is familiar with the Bankruptcy Code, the Bankruptcy Rules, the Local Rules, and the OUST Guidelines and will comply with them.

6. THE COURT SHOULD AUTHORIZE THE TRUSTEE TO EMPLOY THE FIRM AS SPECIAL LITIGATION COUNSEL

> Section 328(a) of the Bankruptcy Code authorizes a trustee to employ a professional person under Section 327 of the Bankruptcy Code on any reasonable terms and conditions of employment, including on a contingent fee basis. See 11 U.S.C. § 328(a). The court may alter the terms of a § 328 employment only if such terms " prove to have been improvident in light of developments not capable of being anticipated at the time of the fixing of such terms and conditions." Id. The professional person is eligible for employment under Section 328 of the Bankruptcy Code if the professional meets the standards applied under 11 U.S.C. § 327.

Pursuant to Section 327(a) of the Bankruptcy Code, a trustee may employ attorneys and other professional persons who do not hold or represent an interest adverse to the estate, and who are disinterested persons, to represent or assist the trustee in carrying out the trustee's duties. An attorney may be employed as special counsel provided such attorney does not hold or represent an interest adverse to the estate with respect to the limited scope of the attorney's employment. *See*, *In re Fondiller*, 15 B.R. 890, 891–893 (9th Cir. BAP 1981); *In re Film Ventures Int'l, Inc.*, 75 B.R. 250, 252 (9th Cir. BAP 1987). An interest is "adverse" if it (i) is an economic interest that would tend to lessen the value of the bankruptcy estate; or (ii) would create either an actual or potential dispute in which the estate is a rival claimant. See, *In re National Liquidators, Inc.*,

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182 B.R. 186,191 (S.D. Ohio 1995); *In re Kliegl Bros. Universal Electric Stage Lighting Co., Inc.*, 189 B.R. 874, 879-881 (Bankr. E.D.N.Y. 1995).

As set forth in the Castaldi Declaration, neither the Firm nor any of its professionals hold or represent any interest that would lessen the value of the bankruptcy estates with respect to the matters on which the Firm is to be employed as Special Litigation Counsel. Moreover, the Firm's representation of the Trustee on the terms described above will not create a conflict. The Firm does not hold or represent any adverse interest to the Debtors in connection with the services to be provided by the Firm.

As stated above, the Firm is well qualified to represent the Trustee in that the Firm has significant experience in investigating and prosecuting business litigation actions, has represented numerous debtors, creditors and trustees in bankruptcy cases, and has handled many adversary proceedings within various bankruptcy cases. Additionally, the terms of the Firm's contingency compensation is reasonable and is commensurate with market rates for comparable services. Accordingly, the employment of Special Counsel is in the best interest of the Estates and should be approved.

7. APPLICATION WITHOUT A HEARING IS APPROPRIATE

Bankruptcy Local Rule ("BLR") 9014-1(b)(3) provides that a party in interest may initiate a request for relief, without setting a hearing, regarding any matter within the scope of the rule, other than those matters described in BLR 9014-1(b)(1). Pursuant to the provisions of LBR 9014-1(b)(3), the Firm has served concurrently herewith a Notice and Opportunity for Hearing with regard to this Application.

8. CONCLUSION

The Trustee respectfully requests that the Court enter an order:

1. Authorizing the Trustee to employ Brown Rudnick LLP as her special counsel upon the terms set forth herein and in the Agreement attached as Exhibit "1" under Sections 327 and 328 of the Bankruptcy Code;

2. Approving Special Counsel's contingency fee arrangement; and

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3. Authorizing reimbursement of expenses to be paid as an administrative expense in such amounts as this Court may hereafter determine and allow.

DATED: February 2, 2015

KAVITA GUPTA
Chapter 7 Trustee for the
Bankruptcy Estates of
Gabriel Technologies Corporation and
Trace Technologies, LLC

Submitted by:

BROWN RUDNICK LLP

BY:

CATHRINE M. CASTALDI
Proposed Special Litigation Counsel
for the Chapter 7 Trustee
KAVITA GUPTA